No. 14564.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a Corporation,

Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,

Appellees.

BRIEF FOR APPELLEE, FRANK R. BLADE.

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BRIEF FOR APPELLEE, FRANK R. BLADE.

I.

Jurisdictional Statement.

The District Court had jurisdiction of appellant's fraud action seeking both alleged compensatory and exemplary or punitive damages against this appellee, Frank R. Blade, and others [R. 3-28, particularly R. 16] pursuant to 28 U. S. C. 1332—diversity of citizenship.

The District Court had jurisdiction to hear and grant the motion of appellee, Frank R. Blade, for summary judgment in accordance with Rule 56(b) of the Federal Rules of Civil Procedure.

Under 28 U. S. C. 1291, this Court has authority to review the judgment of the District Court.

II.

Statement of the Case Relating to Appellee, Frank R. Blade.

There is no dispute as to the facts giving rise to the instant controversy, appellant having filed no counter-affidavit to that filed in support of Frank R. Blade's motion for summary judgment.

On December 10, 1951—prior to the filing of its amended complaint on August 21, 1953 in the District Court [R. 28] and prior to its original complaint filed May 2, 1952 [R. 61]—the appellant, Sears, Roebuck & Co., filed a complaint designated "Complaint (For Money Had and Received)" in the Superior Court of the State of California, against this appellee, Frank R. Blade. [R. 38-39.] By virtue of that Superior Court action, Sears, Roebuck & Co., sought to recover from Frank R. Blade[1] the sum of $75,000.00 for *moneys allegedly received by him before December 1, 1951, for the use of Sears, Roebuck & Co.*

At the same time the summons was issued in the Superior Court action on December 10, 1951, Sears, Roebuck & Co. also filed therein an Affidavit for Attachment Against Resident. [R. 40-41.] This Affidavit for Attachment Against Resident was prepared and sworn to by Russell G. Curry, the Assistant Secretary of Sears, Roebuck & Co., and declared that the defendants in the Superior Court action were indebted to Sears, Roebuck & Co. in the sum of $75,000.00 together with interest thereon at the

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[1]Nella Blade, a sister of appellee, Frank R. Blade, was also named as a defendant in the Superior Court action. [R. 38.] She is not named in the Federal action and is therefore disregarded here in references to the Superior Court action.

rate of 6% per annum from December 1, 1951, upon *an implied contract for the direct payment of money,* that the defendant Frank R. Blade, was indebted to Sears, Roebuck & Co. in said sum for moneys had and received for its use and benefit, that such *contract* was made or is payable in California, and that the payment of said *contract* was without security. [R. 40-41.]

Together with the Complaint and Affidavit for Attachment in the Superior Court action, Sears, Roebuck & Co. also filed a Statement to Clerk on Attachment. [R. 41-42.] The Statement to Clerk on Attachment was prepared and executed by the attorney for Sears, Roebuck & Co. and stated, among other things, that it had commenced, or was about to commence, an action in the Superior Court of the County of Los Angeles, against Frank R. Blade, upon an implied *contract* for the direct payment of money and claiming that there was due it from said defendant the sum of $75,000.00.

Pursuant to the foregoing Complaint, Affidavit for Attachment and Statement, Sears, Roebuck & Co. caused a Writ of Attachment to be issued in the Superior Court Action [R. 43-44] and then caused said Attachment to be levied upon substantial personal property belonging to this appellee, Frank R. Blade. [R. 64, 91.]

Thereafter, pursuant to a demand for a Bill of Particulars made by Frank R. Blade in said Superior Court action, Sears, Roebuck & Co. filed a verified Bill of Particulars. [R. 45-46.] *The Bill of Particulars filed by Sears, Roebuck & Co. and sworn to by its Assistant Secretary, disclosed that the Superior Court action sought certain alleged "secret profits" obtained by Frank R. Blade and arose from and was based upon the same*

reported in 123 Fed. Supp. 136, and, for convenience, the portion thereof relating to the summary judgment motion of Frank R. Blade is set forth in the Appendix to this brief.

III.

Statutory Provisions and Rules Involved.

A. Statutes.

Section 537, California Code of Civil Procedure:

> "[When and actions in which attachment may issue.] The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:
>
> "1. [*Unsecured claims on contract.*] *In an action upon a contract, express or implied, for the direct payment of money,* where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property. . . ." (Emphasis supplied.)

Section 3294, California Civil Code:

> *"Exemplary damages, in what cases allowed. In an action for the breach of an obligation not arising from contract,* where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Emphasis supplied.)

B. Rules.

Rule 56(b), Federal Rules of Civil Procedure:

> "For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

IV.
Questions Presented.

Did the District Court properly grant the motion for summary judgment of the appellee, Frank R. Blade?

May a plaintiff-employer first sue a defendant-employee (Frank R. Blade) in contract in the State Court for alleged "secret profits" [R. 45] and obtain and levy an attachment against his property, such attachment being available *only* in "an action upon a contract" [Code Civ. Proc., Sec. 537(1)], and then sue this same defendant in *fraud* in the Federal Court for alleged compensatory and exemplary damages arising out of precisely the same alleged "secret profits" [R. 9, 11, 12] transactions?

V.

Summary of Argument.

A. Under Long-settled Principles of California Law, Appellant, by Its Prior Suit and Attachment in the State Court Against Appellee, Frank R. Blade, Made a Decisive Election of the Contractual Remedy Against Him and Was Estopped and Precluded From Proceeding Against This Appellee With Its Federal Tort Action for Fraud Based Upon the Same Alleged Transactions.

The California Supreme Court in *Steiner v. Rowley* (1950), 35 Cal. 2d 713, 221 P. 29, has squarely held that under California law, the appellant by suing this appellee in the State court in a contractual action and obtaining and levying an attachment decisively and finally elected its contractual remedy and is barred from proceeding with its inconsistent tort action which it filed in the Federal Court against this appellee based upon the same transaction. Appellant's Federal tort case is based upon diversity of citizenship and hence the California law is controlling.

Appellant has cited no California decisions supporting its position that it may thus sue an employee twice based upon the same transaction, and cases from other jurisdictions are neither controlling nor applicable. No decision cited or relied upon by appellant deals with an attachment situation such as that existing in the instant case, which is of supreme importance in establishing the finality and decisiveness of appellant's choice of its contractual remedy.

The inconsistency of the two actions is not only established by repeated decisions of the courts of California, but also by the vital differences in the actions themselves. Under California law, an attachment may only be obtained in a contractual action, whereas exemplary damages may be obtained under California statute only in an action not upon contract. In its State Court action this appellant obtained an attachment; in its Federal action it seeks exemplary damages.

B. The Alleged Wrongful Conduct of This Appellee Was Indivisible and Gave Rise to a Single Cause of Action for Which Appellant Had Alternative and Inconsistent Contractual and Delictual Remedies Between Which It Was Required to Choose.

It is admitted, and the District Court below so found, that both appellant's prior State court action and its later Federal court action are based upon precisely the same transactions. The alleged disloyalty of this appellee toward appellant constitutes but a single wrong, for which, however, appellant had several alternative remedies available. It chose the contractual remedy. By electing to sue *ex contractu* in the State court, plaintiff waived the alleged tort by this appellee. Appellant cannot waive half a tort by suing in contract and then sue in another case for the other half of the tort. The different measures of damages available in the two types of action do not establish these actions, as appellant urges, as separate and concurrent, but rather serve to emphasize their fundamental and irreconcilable inconsistency.

ARGUMENT.

Whether inadvertently or by design appellant has throughout its opening brief totally ignored the one vital and all-important fact which sets the case of this appellee —Frank R. Blade—apart from the rest and which represents the fundamental factor upon which the District Court rested its granting of Blade's separate motion for summary judgment.

Nowhere in its entire brief does appellant give any weight or consideration to the *attachment* against this appellee which it obtained in its Superior Court action, pursuant to Code of Civil Procedure, Section 537(1) and which it caused to be levied against substantial property of this appellee. Not one of the cases or authorities cited or quoted from by appellant deals with an attachment or is concerned with the effect of an attachment under California law[3] in a case such as that at bar. Yet it is the attachment—and the decisive election of the contractual remedy which, under California law, obtaining an attachment has always meant—that the District Court properly based its summary judgment in favor of appellee, Frank R. Blade.

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[3]It is settled that in Federal diversity suits such as the instant case, ". . . the law to be applied in any case is the law of the State . . . whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision. . . ." Brandeis, J., in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 78. The Supreme Court said, in *Guaranty Trust Co. v. York,* 326 U. S. 99, 109-110, in referring to the *Erie* case, "In essence, the intent of that decision was to insure that, in all cases where a Federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins,* is that for the same transaction the accident of a suit by a non-resident litigant in a Federal court instead of in a

Understandably, perhaps, appellant has thus sought to blur the basic distinctions existing between appellee, Frank R. Blade, and the other appellees. It thus becomes doubly important to underline these differences.

The appellant, Frank R. Blade, filed a separate motion for summary judgment [R. 59-65], distinct from any of the motions filed by the other defendants. The trial court made separate findings of fact and conclusions of law as to the appellee, Blade [R. 87-93], and gave a summary judgment for Blade [R. 94-95] wholly separate from its judgment of dismissal as to Blade's co-defendants. Whatever may be the rights and positions of the other appellees, it must be emphasized, in the interests of achieving clairity and avoiding confusion, that the Motion of Frank R. Blade for Summary Judgment was based and granted upon the final and irrevocable prior election by Sears, Roebuck & Co. of a contractual remedy against *him*. This stems, as hereinafter set forth and as explained in the exhaustive and well-reasoned opinion of

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State court a block away should not lead to a substantially different result."

And it is plain that at least as to this appellee, appellant's rights are necessarily defined and limited by the California attachment law. As the Court, in *Hallidie v. Enginger* (1917), 175 Cal. 505, one of the leading cases in California on the law of attachment, stated, at page 506:

> "The first of these general observations is that the writ of attachment as now employed was unknown to the common law, is a creature of legislative enactment, and has the scope, and only the scope, which the legislature has chosen to accord to it. In some states an attachment may issue in all cases, in some states it may be issued in actions *ex delicto,* in some states it may be issued against the property of the perpetrator of fraud, but in every state the limit of the right to the writ is found in the language of the statutes itself. Therefore, adjudications of sister states are valueless in a consideration of the question unless it be shown that their statutes are in terms substantially identical with our own."

the District Court, from the institution by this appellant against *this* appellee of an action in the State court upon an implied contract for money had and received, based upon the same alleged transactions which form the foundation of its Federal fraud action, followed by an attachment in that contractual action of substantial personal property of *this* appellee.

A. Under Long-settled Principles of California Law, Appellant, by Its Prior Suit and Attachment in the State Court Against Appellee, Frank R. Blade, Made a Decisive Election of the Contractual Remedy Against Him and Was Estopped and Precluded From Proceeding Against This Appellee With Its Federal Tort Action for Fraud Based Upon the Same Alleged Transactions.

Appellant earnestly urges that it may properly sue Blade for accepting secret profits and also sue Blade and others for alleged damages suffered as a result of the agreement pursuant to which the secret profits were obtained. But it is compelled to concede that it has found no California decisions supporting its position.[4] (App. Br.

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[4]Even in the non-California authorities upon which appellant principally relies (App. Br. 11-23) for its contention that it may thus sue the agent or employee twice, there is strong language to the contrary. Thus both the Section and the comment pertaining thereto of the Restatement of the Law of Agency quoted by appellant (App. Br. 11) expressly declare only that a principal may recover damages from a "third party" because of an agent's violation of his duty of loyalty, and may recover from the agent "any profit which the agent improperly received as a result of the transaction" (Restatement of the Law, *Agency,* Vol. II, Sec. 407(2)). *Tarnowski v. Resop,* 236 Minn. 33, 51 N. W. 2d 801 (App. Br. 13-14), similarly declares only that a principal "may recover profits made by the agent" (p. 804) apart from his recovery against the persons with whom the agent dealt. It does not authorize two actions against the agent. Here appellant has already sued in the State Court to recover the alleged "profits made by the agent." *Kuntz v.*

9-10.) California cases are cited permitting suit against the agent and other cases are referred to as authorizing suit against third parties allegedly conspiring with the agent. (App. Br. 10.) Significantly, none authorize both suits against the agent, yet this is precisely what appellant sought to do here.

Even more significantly, in none of these cases cited by appellant—or in any others in its brief—was there a prior attachment involved under a statute such as that in California expressly limiting its use to actions "upon a contract, express or implied, for the direct payment of money." Code of Civil Procedure, Section 537(1). Appellant has thus failed to meet or come to grips with the

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Tonnele, 80 N. J. Eq. 373, 84 Atl. 624 (App. Br. 15-16) is the same. Even the appellant claims no more for this case than the ruling that under New Jersey law a principal may recover an illegal commission obtained by his agent, and then may sue the third party for the recovery of any additional damage. (App. Br. 15-16.] In the English case of *Mayor of Salford v. Lever,* 1 Q. B. 168 (App. Br. 16-19), the discussion deals only with whether a principal is required to sue the agent or the third party first, and the language throughout indicates that there was no contention that the agent could be sued twice. Thus, Lopes, L. J., states that the right against the agent "is to recover the secret bribe which he has received" whereas the right against the third party "is to recover the excess of price which he obtained" through the agent's fraud. *Barnsdall, et al. v. O'Day,* 13 Fed. 828 (C. A. 3, 1905) (App. Br. 19-21) again says no more, at most, than that the agent and the third party may be separately sued; it does not suggest that the agent may be sued twice. To the same effect is *Glaspi v. Keator et al.,* 56 Fed. 203 (C. A. 8, 1893) (App. Br. 21-22). And the Court in *City of Findlay v. Pertz, et al.,* 66 Fed. 427 (C. A. 6, 1895) (App. Br. 22-33) again appears to emphasize the single action available against the agent, for it holds only as appellant concedes (App. Br. 23) that a principal may "hold the agent liable for the wrongful commissions received and also sue the seller for damages for fraud." *Callinan v. Federal Cash Register Co., et al.,* (W. D. Md., 1942), 3 F. R. D. 177, is merely a pleading case and holds only that, as in California, a plaintiff may *plead* inconsistent counts. But ultimately he is required to choose between them and select a theory of recovery before judgment.

real ground upon which the District Court held Sears, Roebuck & Co. had, by its earlier Superior Court action, finally elected its contractual remedy against this appellee.

The Doctrine of Election of Remedies.

The doctrine or rule generally called "election of remedies" has been variously stated by various courts which have had occasion to consider its application and effect. Whatever language has been employed by a particular court in defining this basic principle of law, there is complete unanimity with respect to the elements which must be present before this principle comes into play. All of these elements upon which a binding election of remedies depends were, as the District Court found, present in the instant case.

The rule is succinctly stated by Judge Hall in his opinion below [R. 72]:

> "It is, however, also a settled proposition of law that where a person has two inconsistent remedies and pursues one, and by it gains an advantage over the other party, or causes him damage, then an election is deemed to have been made which operates as an equitable estoppel from pursuing another and different remedy. It is this doctrine upon which the defendants rely.
>
> "There are two necessary elements to this rule. (1) the remedies must be inconsistent, and (2) their first remedy pursued must result in disadvantage, damage, or detriment to the other party."

In *De Laval Pac. Co. v. United C. & D. Co.* (1924), 65 Cal. App. 584, 586, the Court declared:

> "The rule might therefore be stated as follows: Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies

or performs any act in the pursuit of such remedy, whereby he has gained any advantage over the other party, or he has occasioned the other party any damage, he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right."

In *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.,* 290 Fed. 712 (C. A. 2d, 1923), the Court not only states the election of remedies rule and the factors which bring it into operation, but in language particularly pertinent here gives some of the historical background and the considerations which gave rise to the rule (pp. 724-725):

"At common law the party wronged by an unlawful conversion of his personal property had at his command the three remedies of trover, trespass, and replevin. In the course of time he acquired an additional remedy, that of assumpsit. The law permitted the injured party to waive the tort, treat the wrongdoer as his agent, and upon the latter's sale of the property regard the sale as having been made for the owner's benefit, and the receipt of the consideration as held in trust for the owner; and if, instead of selling the property, the wrongdoer so used it that it could not be reclaimed, he could be sued for its value in an action for goods sold and delivered. The theory of the remedy of assumpsit was rested upon a transfer of title to the converted property from the owner to the wrongdoer or his vendees. It was the direct opposite of the theory upon which rested the remedies of trespass, trover, and replevin; the theory of all three being that title continued in the injured party. *The remedy of assumpsit was therefore the alternative of the other three, and a resort to it was a bar to any recourse to either of the other three, and vice versa.* . . .

"It is evident that the United States could proceed upon the theory of ownership of the copper in itself and sue for the recovery of it, or of the proceeds realized from its unlawful conversion, or waiving ownership of the copper, it might sue as a creditor to recover the debt due because of the unlawful conversion. The two methods of redress are based on inconsistent theories. *The general rule is that in all such cases, when the choice is once actually made between inconsistent theories and remedies, it operates as a bar, and the suitor will not be allowed to invoke the aid of the court upon contradictory principles of redress upon one and the same line of acts. A party cannot occupy inconsistent positions in the same matter.*" (Emphasis supplied.)

The Supreme Court of California in Steiner v. Rowley has Held That Under California Law, Appellant Has Decisively Elected Its Contractual Remedy and May Not Proceed With Its Inconsistent Tort Actions.

The application of the doctrine of election of remedies to the case at bar therefore depends upon (1) whether the contractual remedy sought by the appellant in its Superior Court action is inconsistent with the tort remedy it seeks here, based as the two actions are upon the same transactions, and (2) whether the issuance and levy of the writ of attachment by appellant in the Superior Court action constitutes the decisive choice of action which the application of the doctrine requires.[5]

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[5]The California Code of Civil Procedure, Section 537(1) provides, insofar as pertinent here, that the plaintiff may have the property of the defendant attached "in an action upon a contract, express or implied, for the direct payment of money. . . ." The California cases have uniformly construed this statute in accordance with its express terms as permitting an attachment *only* where the action is one based on contract and denying it both in actions

The mere statement of the completely antithetical nature of the two actions and that attachment proceedings were instituted by appellant in its pending State court suit and levied upon property of this appellee would appear to answer both of these issues in the affirmative. However, it is not necessary to rely entirely upon logic and theory, however persuasive, to determine the wholly inconsistent nature of the two actions and the decisive character of the election demonstrated by the attachment proceedings, for the courts have had occasion to pass upon these questions and have answered them in accordance with the position taken here by the appellee, Frank R. Blade.

Squarely in point, and establishing both the inconsistent character of a contractual action for money had and received and a tort action for fraud, and the estoppel created by the issuance and levy of a writ of attachment in the action based upon contract, is *Steiner v. Rowley* (1950), 35 Cal. 2d 713, 221 P. 2d 9. There, the defendant, a real estate broker, represented plaintiffs in connection with their purchase of certain real estate. Under a pleading consisting of four counts, plaintiffs sued him to recover the amount of his commission, an alleged secret profit, and exemplary damages. *One count seeking to recover*

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ex delicto and in actions where equitable relief as such is sought. *Stowe v. Matson,* 94 Cal. App. 2d 678; *Oil Well Core Drilling Company v. Barnhart,* 20 Cal. App. 2d 677; *McCall v. Superior Court,* 1 Cal. 2d 527; *Powers v. Freeland,* 114 Cal. App. 146; *Hallidie v. Enginger,* 175 Cal. 505; 2 Cal. Jur. 2d 638.

The District Court, moreover, aptly pointed out that the availability of attachment under California law only in contractual actions is additional evidence of the inconsistency between such actions and tort actions [R. 72-73]: "A writ of attachment will issue under California C. C. P. 527, in an action *ex contractu,* but not one *ex delicto,* which alone is a sufficient mark of inconsistency."

the secret profits paid to the defendant was for money had and received, and another count relating to said secret profits was for fraud and asking exemplary damages. The plaintiffs had obtained a writ of attachment. The California Supreme Court stated (p. 720):

> "Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedy is based upon the principle of estoppel. 'Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy whereby he has gained any advantage over the other party, . . . he will be held to have made an election of such remedy and will not be entitled to pursue any other remedy for the enforcement of his right.' (*DeLaval Pacific Co. v. United C. & D. Co.,* 65 Cal. App. 584, 586; 224 Pac. 766). The doctrine is well established (*Ravizza v. Budd & Queen, Inc.,* 19 Cal. 2d 289, 293; [120 Pac. 2d 865]; *Holt Mfg. Co. v. Ewing,* 109 Cal. 353, 356; [42 Pac. 435]; *Parke, etc. Co. v. White River L. Co.,* 101 Cal. 37, 41; [35 Pac. 442]; *Smith v. Miller,* 5 Cal. App. 2d 564, 570; [43 Pac. 2d 347].)
>
> *"An action for tort in which exemplary damages are sought is inconsistent with one for money had and received (Civil Code, Section 3294).* The Steiners were therefore required to make a timely election of remedies. Pleading the two causes of action in the alternative did not constitute an election, because inconsistent counts are permissible . . . and an election cannot be enforced by demurrer. . . . *But the Steiners also obtained an attachment. This was a positive act of a plaintiff* 'in pursuit of . . . (the contractual remedy) . . . *whereby he has gained . . . advantage over the other party . . .*' (*De Laval Pacific Co. v. United C. & D.*

> *Co.,* 65 Cal. App. 584, 586; 224 Pac. 766.) *The Steiners were therefore estopped to allege a cause of action in tort and the demurrer as to the fourth count was properly sustained."* (Emphasis supplied.)

Appellant seeks to distinguish the *Rowley* case, and asserts that the District Court's reliance upon this decision is "misplaced" because, appellant says, the plaintiff there was seeking to recover from his agent the "same monetary damages" both in the first three money had and received counts upon which an attachment issued, and in the fourth count in tort for fraud. (App. Br. 33.) If this were truly the ground of the *Rowley* decision it is certainly strange that the Supreme Court of California did not see fit to mention it, but instead stressed only the plainly inconsistent character of the contract and tort counts and placed its holding squarely upon this inconsistent character and the plaintiff's positive election of his contractual remedy by obtaining an attachment.

Furthermore, at an earlier point in its brief (App. Br. 28) appellant urges that the "separate and distinct character" of its two actions is demonstrated "by the fact that Appellant has a right to the recovery of exemplary damages" in its Federal action which it seeks [R. 16] and which it did not have in its State court contractual action. Yet in the *Rowley* case the tort count which the Supreme Court held the plaintiff there precluded from pursuing as "inconsistent" rather than "separate and distinct" was one—just as appellant's action here—which sought exemplary damages, and expressly declared (*Steiner v. Rowley, supra,* at 720) that "An action for tort in which exemplary damages are sought is inconsistent with one for money had and received."

Appellant, with respect to the *Rowley* case, which this appellee deems controlling and decisive, has:

(a) Misstated its facts in attempting to distinguish it by asserting that the tort count seeking exemplary damages sought the "same monetary damages" as the contract counts;

(b) Itself demonstrated that since it may seek—and does seek—exemplary damages in its Federal fraud action, this latter action, under the *Rowley* decision, is indelibly stamped as "inconsistent with", rather than "separate and distinct" from, its prior contract action in the State court.

And by obtaining and levying an attachment as it did in the prior contract action against this appellee, appellant, just as did the plaintiff in the *Rowley* case, finally and conclusively elected the contractual remedy and is estopped, as the District Court below held, to proceed with its inconsistent Federal tort action against this appellee.

Other California Decisions Are Fully in Accord With Steiner v. Rowley.

Both before and since the *Rowley* case, the Supreme Court of California has emphasized the basic substantive inconsistency between an action *ex contractu* such as that instituted by appellant against this appellee in the Superior Court, and an action *ex delicto* such as that which appellant has instituted and seeks to maintain against this appellee in District Court, both actions depending upon and arising from precisely the same alleged transactions.

Thus, in *Hallidie v. Enginger* (1917), 175 Cal. 505, 508, in language having striking application to the case at bar, the Supreme Court defined the fundamental dis-

tinction between, and the mutually exclusive character of, contractual and tort actions:

> *"Or again, if B. in the employ of A. misappropriates his money or property, while A could sue ex delicto for the wrong, he could, on the other hand, waive the tort and sue, again depending upon the nature of the property converted, either for the value of the goods sold and delivered or for money had and received.* . . .
>
> *"Nevertheless, while in these limited kinds of cases, the suitor might do either, he could not do both.* He had to elect his remedy and stand upon his election. If he waived the tort and sued in contract, his writ and declaration charged upon contract only. If he waived his contract and sued in tort, the writ and declaration charged in tort only. Next, let it be remarked that the common law distinctions between actions *ex contractu* and actions *ex delicto* have not been changed by the permission to file rambling pleadings containing averments pertaining to both classes of actions and even averments addressed to equity alone. *And, finally, let it be remarked that our statute and statutes like ours, grant a writ of attachment only in cases ex contractu, and therefore deny it both in actions ex delicto and in actions where equitable relief as such is sought."* (Emphasis supplied.)

And in *Estrada v. Alvarez* (1952), 38 Cal. 2d 386, 391:

> "As previously stated, plaintiffs pray, in the alternative, for damages for fraud. Their original complaint attempted to state a cause of action for damages for breach of contract. (This attempt has been abandoned.) In pursuit of this contract remedy plaintiffs obtained an attachment. They are, therefore, estopped to pursue the tort remedy of damages for fraud."

In *Eistrat v. Brush Industrial Lumber Company* (1954), 124 Cal. App. 2d 42 at 45, the Court stated:

> *"The rule is established in California that one who obtains an attachment in pursuance of a contractual remedy is estopped to later pursue another remedy predicated upon an alleged tort arising from the same set of facts."* (Emphasis supplied.)

See also:

Steiner v. Thomas (1949), 94 Cal. App. 2d 655, 660, 211 P. 2d 321;

Philpott v. Superior Court (1934), 1 Cal. 2d 512, 520;

McCall v. Superior Court (1934), 1 Cal. 2d 527, 530, 532;

Jones v. Martin (1953), 41 Cal. 2d 23, 33;

Schulze v. Schulze (1953), 121 Cal. App. 2d 75, 83.

Judge Hall, in his opinion below, well stated the rationale of these decisions [R. 79-80]:

> "The plaintiff was confronted with making a decisive choice—it could sue Blade *ex contractu* and attach his property, thus securing itself by that attachment for any judgment it might ultimately get, and assuring itself thereby that it would get something back from Blade for his wrong to it before Blade could sequester the property—or it could forego that right and sue him *ex delicto* and take its chances on ever collecting a judgment. It was a choice with which every lawyer is confronted; whether to take the bird in hand by attachment, or to try to get two birds in the bush by a fraud action. It chose to take the bird in hand. It was a knowing choice

with its advantage of attachment. The law says it was a decisive choice. And the law will not permit it to pursue both choices at the same time merely because by a fraud action it may be more nearly able to recoup a greater sum than in the *ex contractu* action."

What has been said would appear effectively to dispose of appellant's contention that its State court contractual action and its Federal court tort action against this appellee are separate and concurrent remedies and to establish the correctness of the decision of the District Court that under controlling California law the actions are wholly inconsistent, that by obtaining an attachment appellant made a decisive election of its contractual remedy, and that it is now estopped to pursue this appellee in tort in the Federal court on the same transactions. However, in view of appellant's repeated assertion of the separate, distinct and concurrent character of its two actions, some further discussion would perhaps not be inappropriate to show that even apart from the doctrine of election of remedies the courts have considered contractual and delictual actions against the same defendant based, as here, upon the same transactions, as alternative and inconsistent.

B. The Alleged Wrongful Conduct of This Appellee Was Indivisible and Gave Rise to a Single Cause of Action for Which Appellant Had Alternative and Inconsistent Contractual and Delictual Remedies Between Which It Was Required to Choose.

Appellant seeks to avoid the California rule so clearly announced by the cases barring the instant action, by attempting to divide and split what was admittedly the same transaction into two separate parts and then urging that the State action relates to one part of the split transaction and this action to the second part. Thus, appellant would have this Court declare that the State court contractual action for alleged secret profits received by this appellee from the other defendants is wholly separate from the instant action for damages for fraud allegedly perpetrated by these defendants as part of the identical transaction whereby the secret profits or rebates were allegedly given to this appellee. How appllant can maintain and seriously urge this position is difficult to conceive in view of the single and indivisible nature of the transactions involved.

Appellant's basic cause of action against its employee, Blade, is simply one for the latter's alleged fraud upon his relationship to appellant as an employee—by subjecting his employer to over-charges in consideration of his receiving secret profits or commissions. Such alleged disloyalty by an employee constitutes a *single wrong* for which his employer has, however, *several alternative remedies* against him.

Appellant's fraud remedy obviously afforded it the greatest possible recovery, but it decided to rely upon a contractual remedy in order to utilize and obtain for itself the tremendous advantage of the attachment process.

As we have seen, the California courts hold that upon taking this step, a plaintiff makes a final and positive election of his remedy and is therefore estopped from seeking additional relief against the same defendant on a tort theory. And as has been pointed out, the California election of remedy cases are predicated upon an equitable estoppel prohibiting a plaintiff from pursuing inconsistent remedies against the same defendant, based upon the same transaction or set of facts. As Judge Hall stated in his opinion [R. 79, 76]:

> "The plaintiff cannot ratify half of the acts of Blade in dealing with his co-defendants by suit and attachment, where those acts are indivisible, as here, then sue in this court *ex delicto* not only for that half but as well for the additional half. *So far as Blade is concerned, he had one single indivisible obligation to his employer.*
>
> "By electing to sue *ex contractu* in the State court, the plaintiff waived the tort by Blade, and one cannot waive half a tort by suing in contract and then sue in another case for the other half of the tort." (Emphasis supplied.)

Analogous to the doctrine of election of remedies but based upon a slightly different rationale, to-wit, the invasion of a single primary right, are the cases involving splitting a cause of action. As stated in *Wulfjen v. Dalton* (1944), 24 Cal. 2d 891 at 894-6:

> "It is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim. (1 C. J. S. Sec. 102, p. 1306; *Quirk v. Rooney,* 130 Cal. 505 (62 P. 825); *Bingham v. Kearney,* 136 Cal. 175 (68 P. 597); *Pala-*

dini v. Municipal Markets Co., 185 Cal. 672 (200 P. 415).) The rule against splitting a cause of action is based upon two reasons: (1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judically determined, or by asserting claims which properly should have been settled in some prior action. Thus, it is said in *Bingham v. Kearney, supra,* at page 177: 'It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation.'

"The present case falls within the scope of the above principle of law. As to plaintiff and defendants Dolton, Potts and King, the *prior action* was identical insofar as the parties thereto were concerned, and the same series of alleged fraudulent acts and misrepresentations on the part of said defendants urged in the rescission action forms the basis of plaintiff's claim for damages here. . . . The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and *the relief is not to be confounded with the cause of action,* one not being determinative of the other. (Pomeroy, Code Remedies, 5th ed., § 351, p. 536.)" (Emphasis supplied.)

And in *Evans v. Horton* (1953), 115 Cal. App. 2d 281, 284:

"A party claiming to have been defrauded must seek all the relief to which he may be entitled in one action . . ."

Stated another way, and particularly applicable here, is the language found in 1 Cal. Jur. 2d 699-700:

> "Thus, if a plaintiff's claim is founded . . . on one single and continuous tortious act, it cannot be divided into distinct demands and made the subject of separate actions."

Appellant overlooks the fact that in some situations the same wrongful act may constitute both a breach of contract and the invasion of an interest protected by the law of torts. Certainly in such situations it is the privilege of the injured party to bring either type of action or to file one suit pleading both causes of action in separate counts whenever it would be to his advantage to do so. *But he is nevertheless required to elect at some stage between his inconsistent remedies and is entitled to a recovery under only one of such remedies.*

> "The same act or transaction may, however, constitute both a breach of contract and a tort, in which case, but subject to the limitation that they cannot recover twice for the same wrong, the injured party may sue either in contract or in tort, as, for example, where the act complained of consists of the violation of some duty merely incident to, or arising out of, a contract."
>
> 1. C. J. S. 1104, Sec. 47.

As stated by the California Supreme Court in *Jones v. Kelly,* 208 Cal. 251, 254:

> "If the cause of action arises from a breach of promise the action is *ex contractu,* but if it arises from a breach of duty growing out of the contract it is *ex delicto* . . . A tort and trespass is none the less such because it incidentally involves a breach of the contract . . . The law imposes the obliga-

> gation that 'every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights.' (Sec. 1078 Civ. Code.) This duty is independent of the contract and attaches over and above the terms of the contract. This being so, the plaintiffs may treat the injury as a tort or as a breach of contract at their election."

See also *Peterson v. Sherman,* 68 Cal. App. 2d 706, 711.

Sears elected, however, to waive any breach of duty or tort allegedly committed by this appellee and brought an action for money had and received based upon implied contract—in order to obtain the powerful advantage of attachment. The nature of such an action is extensively considered in *Philpott v. Superior Court,* 1 Cal. 2d 512, 518, where the Supreme Court declared that:

> *". . . it is a case where the plaintiff has not elected to sue for damages, general or special or both, which he may have suffered from the tort inflicted upon him by defendants;* likewise it is not a case where the plaintiff is seeking the application of equitable remedies to redress his grievances. All these elements, which may have been shown by appropriate allegations for such relief, are conspicuously absent. *Plaintiff apparently is content to merely seek a return from defendants of money given with interest, forgetting and foregoing all other elements of injury. Is it not plain, therefore, that he has waived the tort of defendants and has come into court relying solely upon the promise created by law to return to him the consideration paid upon the contract?* (Emphasis supplied.)

And as stated in 1 C. J. S. 1128, 1145, Secs. 49, 50(f):

> "To begin with, where the matter out of which the cause of action arises has in it elements of both contract and tort, complainant may waive the tort and sue in contract. So, if there is an express contract, and the same act or transaction constitutes both a tort and a breach of the contract, the injured party may waive the tort and sue on the contract . . ."
>
> . . .
>
> "By waiving the tort and suing in contract, a party necessarily waives the entire tort, and cannot recover part of his damages in contract and afterward maintain an action in tort for the balance . . ."

Thus, it is clear that although this appellee's alleged conduct as between himself and his employer may at one and the same time have constituted a breach of contract, a breach of a statutory duty, and a fraud sounding in tort, this does not mean that his employer is entitled to recover in separate actions on each of these theories. Rather, appellant had one single cause of action against this appellee which was necessarily the basis of its complaint in the California Superior Court. It cannot now sue clothed in a different remedial garb on this same single cause of action.

The different measures of damages in the two actions here in question obviously does not mean that these actions are separate and concurrent as appellant suggests. Rather, as we have already shown, the very difference in the measure of damages actually demonstrates the basic inconsistency between contractual and delictual remedies. An attachment action required under California law to be based on "contract" (Code Civ. Proc. 537(1)) can hardly be said to be consistent with the only type of ac-

tion which under California law entitles a plaintiff to exemplary damages, namely, "an action for the breach of an obligation *not* arising from contract." (Civ. Code 3294.) And this, as we have heretofore stated, is precisely what the California cases have held. *Steiner v. Rowley,* 35 Cal. 2d 713, 720; *Acme Paper Co. v. Goffstein,* 125 Cal. App. 2d 175, 178.

In any case, it is readily apparent that the remedy selected by the plaintiff governs the nature of his recovery. The language of the court in *Dawson v. Baum* (Wash.), 19 Pac. 46, quoted in 69 A. L. R. 655, at 657-8, well illustrates the complete chaos which would result if a plaintiff were permitted to sue in separate actions on different theories and for different items of damages caused it by a single act or wrong of the defendant. In that case the property of the plaintiff had been unlawfully taken on execution and thereafter recovered by him in a statutory action. He subsequently brought an action to recover for damage to his credit and good standing as a merchant. It was held that the judgment in the statutory action by which he obtained a return of his property was a bar to the subsequent action. The court, after pointing out the different remedies originally available to the plaintiff under the facts of the particular case, describes the chaotic effect of any holding to the contrary:

> "Thus, for this wrong, the plaintiff had the election of six different kinds of action, and his remedy might have been different in each. Now, having chosen his remedy, and secured full satisfaction according to his choice, he now sues again for the same wrong, because he thinks he has made an unwise choice. After recovery, and being satisfied in one action, can he, for the same wrong, continue to sue in each of the other five forms, because there is some

peculiar benefit in each that is not in the other? Had he sued in the action wherein he could have recovered the property and the damages for detention, and have left out the damages by his good will or mistake, could he bring another action for the damages he omitted? To choose to sue as he did was to voluntarily omit the damages for detention. To sue as he did, instead of in trespass, was omitting, voluntarily, exemplary damages, and this omission is of the same effect as if in trespass he had omitted to claim vindictive damages. *When the law gives a choice of remedies for a wrong, the plaintiff, by choosing the benefits of one form, waives the benefit of other forms;* upon the same principle that if, in an action for damages for a wrong, he omits some fact which would increase the damages, he loses it. It is for the interest of the public that litigation shall not be had about one wrong by many actions. It is wrong for a plaintiff to split up a contract or wrong into many parts, and thus harass and put to costs a defendant, when the plaintiff can recover, if he chooses, all in one action. One action, judgment, and satisfaction for one wrong are all the law allows. For these reasons we think the plea in bar should have been sustained." (Emphasis supplied.)

California is in accord with the result reached in the *Dawson* case. In *McCaffrey v. Wiley,* 103 Cal. App. 2d 621, the plaintiff had recovered possession of certain land by an action in ejectment and then brought the instant action to recover damages for the wrongful withholding of possession. In holding that the latter action was barred the Court stated (pp. 624-625):

"In the instant case, the one primary right involved was the right of the appellant to possession of the land and there was but one violation of that

duty on the part of the respondent. Both actions were based on the same invasion of the same right, and under the well established rules with respect to the splitting of actions which prevails in this state the appellant should have presented his claim for damages in the prior action, and by failing to do so he must be held to have waived it."

Thus, from whatever direction the issue is approached the result is the same: appellant may not, under fundamental principles, properly proceed with its District Court fraud action against this appellee.

Conclusion.

The District Court in granting the Motion of Frank R. Blade for Summary Judgment properly and correctly applied the California law, and, as to Frank R. Blade, no other conclusion can be justified in view of the clear language of the attachment statute and the controlling California decisions as to election of remedies.

For all of the foregoing reasons, it is submitted that the court below did not commit error in granting the said Motion for Summary Judgment of this appellee and that its judgment should, therefore, be affirmed.

Respectfully submitted,

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APPENDIX.

Portion of Opinion of Honorable Peirson M. Hall, United States District Judge, Granting Motion for Summary Judgment of Appellee, Frank R. Blade.

United States District Court, Southern District of California, Central Division.

Sears, Roebuck & Co., a corporation, plaintiff, vs. Frank R. Blade, *et al.,* defendants. No. 14,079-PH Civil.

MEMORANDUM OPINION.

The original complaint in this matter was filed on May 2, 1952. It was in three causes of action; the first for alleged liability under the Sherman Act; the second for alleged liability under the Clayton Act, and the third a count for damages for fraud.

Upon motions to dismiss, an order was made sustaining the motion to dismiss without leave to amend as to the first and second causes of action and sustaining the motion to dismiss as to the third cause of action with leave to amend (see Sears, Roebuck v. Blade, 110 Fed. Supp. 96). After the filing of that memorandum, in February, 1953, appeal was taken by the plaintiffs but later abandoned, and on August 21, 1953, the plaintiff filed an amended complaint for damages for fraud in one cause of action.

The matter is before the court on a motion for summary judgment by defendant Blade, and on motions of the other defendants to dismiss or in the alternative for summary judgment.

By its amended complaint the plaintiff seeks to recover damages for fraud from Blade, (its former employee for many years), Metropolitan Engravers, Ltd.,

a corporation, Metropolitan Mat Service, Inc., another corporation, Gregory F. Duffy, Aubrey A. Duffy, and Walter Duffy, and Alfred Smutz, officers and directors of those two corporations, and Barnard Engraving Company, Inc., a corporation, and James G. Barnard and Margaret Davis, alleged to be the officers, agents and representatives of the Barnard Company.

The substance of the plaintiff's cause of action is alleged to be as follows: defendant Blade was employed by the plaintiff in the capacity of Advertising Manager for what it refers to as its Los Angeles Group of stores; as part of his duties as such Advertising Manager, he was required to negotiate and contract for the engraving of material which was to be used, and was used, by the plaintiff in connection with its advertising in newspapers; that fom January 1, 1937, until the month of December, 1951, defendant Blade entered into and executed many contracts with the defendant Metropolitan Engravers, which company, in turn, manufactured engravings which were sold to, and used by, the plaintiff in its newspaper advertising, that throughout the entire period the defendant Metropolitan Engravers and its officers and agents "secretly, fraudulently, unfairly and deceptively conspired and agreed that the defendants 'Engravers' and 'Mat Service' would pay to the defendant Frank R. Blade, would receive and accept secret, fraudulent, unfair and deceptive rebates, profits or commissions in the sum of $400.00 per month in consideration of which said defendant Blade would contract for all engraving to be purchased by the Los Angeles Group of stores owned and operated by plaintiff with said defendant 'Engravers' and no other person, firm or corporation, and would permit them to charge and would procure plaintiff to pay them sums of money greatly in excess of the then going price

for identical quantities of identical or similar engraving current in the Los Angeles market and at prices substantially in excess of the prices which plaintiff would have been charged by competitors of defendants for like quantities of engraving of like grade and quality. In particular it was agreed between said defendants that plaintiff would be charged and would pay to said defendant 'Engravers' sums of money based upon varying basic prices of $.033 to $.044 per unit of engraving, although the fair market price in the Los Angeles area and the prices concurrently charged other purchasers in said area who were competitors of plaintiff for like quantities of engraving of like grade and quality was $.030, or less; and that, for extra work in connection with such engraving not included in such unit price, equivalent additional charges over and above the fair market price for such extra work would be made by defendant 'Engravers' and paid by plaintiff."

It is further alleged in the complaint that prior to October 31, 1949, defendant Blade was instructed by plaintiff to contract for part of the engraving for the Los Angeles Group of stores with engraving firms other than the defendant Metropolitan Engravers; that thereupon the defendants and each and all of them, further contracted and agreed among themselves that the engraving business of the plaintiff should be divided between the defendant Metropolitan Engravers and the Barnard Company, and that no other person, firm or corporation should be allowed or permitted to secure any such business; that the base price would be $.044 per unit "and not at the fair market price in the Los Angeles area of $.030, or less." It is also alleged that the Barnard Company and James G. Barnard and Margaret Davis also agreed

to pay Blade a secret profit amounting to 15% of the gross amount of all moneys received from plaintiff for engraving done by the Barnard Company. It is further alleged that said agreements were carried out and executed by the defendants. The complaint has attached to it a list of payments beginning February 6, 1942, to November 29, 1951, and alleges that the total amount paid for engraving during that period was the sum of $563,-504.50; that the fair market value was the sum of $141,-979.95 less than the total figure. It is also alleged that the dates and amounts of purchases of engravings made by plaintiff from defendant Engravers during the period of time from on or about January 1, 1937, until on or about February 5, 1942, and the total amount so charged by defendants and paid by the plaintiff during that period are unknown to the plaintiff. It is alleged that the difference between the fair market value and the amount paid by plaintiff to Barnard Co. was the sum of $20,-021.50.

The plaintiff then alleges that the total amount received by Blade from the Metropolitan Engravers and Metropolitan Mat Service was a sum in excess of $50,000 and the amount paid to Blade by the Barnard Co. was $8,250.

The circumstances of the discovery of fraud are alleged to be that all of the acts and agreements and conduct of the defendants, above described, were unknown to the plaintiff until on or about the 10th day of December, 1951; that on or about the 6th day of July, 1951, plaintiff received an anonymous letter to the effect that some unidentified person who was engaged in purchasing for the plaintiff was engaged in receiving secret payoffs. The letter did not identify the party charged, but the

letter caused the plaintiff to investigate those engaged in purchasing, which resulted in the discovery by them, on or about the 10th day of December, 1951, of the acts and conduct upon which it bases its claim for relief. The complaint seeks actual damages totaling $162,001.45, and $250,000 as exemplary or punitive damages.

Defendant Frank R. Blade has answered with the usual denials; and alleges that all claims prior to May 2, 1949, are barred by the statute of limitations of California [C. C. P. §339(1)] and that all acts prior to May 2, 1948, are barred by the provisions of Section 338 of the California Code of Civil Procedure; that all claims are barred by laches on the part of the plaintiff; and as a separate defense alleges in his sixth additional defense that prior to the filing of the Amended Complaint herein on August 21, 1953, and prior to the filing of the original complaint herein on May 2, 1952, and to-wit: on December 10, 1951, the plaintiff filed a complaint for money had and received in the Superior Court of the State of California in and for the County of Los Angeles, wherein the plaintiff herein was plaintiff therein and the defendant Frank R. Blade and Nella Blade were defendants; that the plaintiff in that case secured a writ of attachment under the provisions of Section 537 of the Code of Civil Procedure of the State of California and caused the same to be levied by the Sheriff of Los Angeles County; that in response to a demand for a bill of particulars, Sears, Roebuck filed a bill of particulars which contains, in substance, the same charges contained in the complaint herein, and that by the filing of the Superior Court action the plaintiff made an election of remedies, resulting in damage or injury to the defendant Blade and that by virtue of such election of remedies, the plaintiff is

estopped from maintaining the instant suit against Frank R. Blade.

The motion of defendant Blade for summary judgment will be considered before discussing the motions of the other defendants.

Blade's motion for summary judgment is based upon the ground that plaintiff is estopped from asserting tort liability against him, in that plaintiff, by its suit and attachment in the Superior Court, made a decisive election of remedies.

The motion is based on the pleadings, including the verified answer of Blade and the affidavit of Mr. Knudson, which, in substance, contains all the factual matters set forth in the sixth separate defense of Blade. The facts therein alleged are undenied; they are material. There is thus no genuine issue as to them, which postures the case for summary judgment as to Blade, under Rule 56 F. R. C. P., if, as matter of law, the suit and attachment in the State Court constitute such an election of remedy by the plaintiff as to estop it from pursuing the within action for alleged torts of Blade. *Miller v. Hoffman,* 1 F. R. D. 290.

The mere pursuit of a remedy does not necessarily estop a party from pursuing another inconsistent remedy. It frequently occurs that the remedy first pursued by a wronged party develops into no remedy at all, that is to say, it develops after trial, and even after appeal, that the plaintiff never had such a right or remedy to recover. An election of remedies presupposes the existence of two *valid* remedies. If one turns out not to be valid, a plaintiff cannot be held to have made an election, because one cannot choose to have that to which he is not entitled.

As said in *Bierce v. Hutchins,* 205 U. S. 340, 347, "It does not purport to be a choice, and it cannot be one because the party has no right to choose." *Barnsdall v. Waltemeyer* (C. C. A. 8, 1905), 142 Fed. 415, cert. den., 201 U. S. 643; *Southern Pacific Co. v. Bogert* (1919), 250 U S. 483; *Rankin v. Tygard,* 198 Fed. 795; *Brown v. Fletcher* (C. C. A. 6, 1910), 182 Fed. 963, cert. den., 220 U. S. 611.

It is, however, also a settled proposition of law that where a person has two inconsistent remedies and pursues one, and by it gains an advantage over the other party, or causes him damage, then an election is deemed to have been made which operates as an equitable estoppel from pursuing another and different remedy. It is this doctrine upon which the defendants rely.

There are two necessary elements to this rule: (1) the remedies must be inconsistent, and (2) their first remedy pursued must result in disadvantage, damage, or detriment to the other party. *De Laval Pac. Co. v. United C. & D. Co.* (1924), 65 Cal. App. 584, 586.

The suit in the Superior Court was for money had and received—it is *ex contractu;* the suit here is *ex delicto.* They are inconsistent. *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.,* 290 Fed. 712 (C. C. A. 2, 1923); *Steiner v. Rowley* (1950), 35 Cal. 2d 713, 720; *Philpott v. Superior Court* (1934), 1 Cal. 2d 512, 520; *McCall v. Superior Court* (1934), 1 Cal. 2d 527, 531. A writ of attachment will issue under California C. C. P. §527, in an action *ex contractu,* but not one *ex delicto,* which alone is a sufficient mark of inconsistency. As said in *Hallidie v. Enginger* (1917), 175 Cal. 505, 508:

> "Next, let it be remarked, that the common-law distinctions between actions *ex contractu* and actions

ex delicto have not been changed by the permission to file rambling pleadings containing averments pertaining to both classes of actions, and even averments addressed to equity alone. And, finally, let it be remembered that our statute and statutes like ours grant a writ of attachment only in cases *ex contractu,* and therefore deny it, both in actions *ex delicto* and in actions where equitable relief as such is sought."

The second necessary element for estoppel by election is also present here, *i. e.,* securing an advantage in the state suit by getting the writ of attachment. *Steiner v. Rowley, supra; Estrada v. Alvarez* (1952), 38 Cal. 2d 386.

In the *Steiner* case, *supra,* the complaint was in four counts, one of which was for money had and received and another for fraud for secret profits by an agent of the plaintiff. An attachment was secured. The court said (p. 720), ". . . the Steiners also obtained an attachment. This was a positive act of a plaintiff 'in pursuit of . . . (the contractual remedy) . . . whereby he has gained . . . advantage over the other party . . .' (*De Laval Pac. Co. v. United C. & D. Co.,* 65 Cal. App. 584, 586, 224 Pac. 766). The Steiners were therefore estopped to allege a cause of action in tort, and the demurrer to the fourth count (the tort count) was properly sustained."

In the *Estrada* case, *supra,* the court stated (p. 391), "As previously stated, plaintiffs pray, in the alternative, for damages for fraud. Their original complaint attempted to state a cause of action for damages for breach of contract (this attempt has been abandoned). In pursuit of this contract remedy plaintiff obtained an attach-

ment. They are, therefore, estopped to pursue the tort remedy of damages for fraud."

The plaintiff contends, however, that the doctrine of the above cases does not apply; asserting that the state court action was one to recover secret profits received by Blade in which the measure of damages was the amount of money received by him, whereas, here, the measure of damages is the detriment caused by the fact that Blade entered into the fraudulent agreements with his co-defendants and carried them out. No authority is cited in support of this contention.

The money received by Blade and sought to be recovered in the state court is part of the damages sought to be recovered in the instant action. The plaintiff has an attachment on Blade's property to secure his judgment in the state court if he obtains one. It has not dismissed the state action or released the attachment.

From the allegations of the complaint and from the undenied pleadings filed in the state action, it appears that the acts of Blade with the defendants here, constituted *one* continuous wrong; and that the *acts* of *Blade* and the *acts* of his co-defendants in this case, were the basis of the suit in the state court. This is the only conclusion which can be reached from reading the pleadings in the within action and in the state court action, but it is emphasized by the following statements of the verified bill of particulars filed by the plaintiff in the state action:

> "Secret profits received by Defendant Frank R. Blade for and on account of Sears, Roebuck and Co. but not accounted for or paid over to said company as follows:
>
> "(a) Sums amounting to Four Hundred Dollars ($400.00) per month received by Frank R. Blade

from January, 1937, to October, 1951, inclusive, a period of one hundred sixty-six months, from Metropolitan Engravers, Ltd., a corporation, and Metropolitant Mat Service, Inc., amounting to Sixty-Six Thousand, Four Hundred Dollars ($66,400.00).

"(b) Sums received from Barnard Engraving Company (formerly known as Barnard-Quinn Co.) during the period from September, 1949, to and including November 1, 1951, amounting to Eight Thousand, Five Hundred Eleven and 50/100 Dollars ($8,511.50)."

These are the *same acts* which plaintiff relies on in the instant suit. The plaintiff seeks in this action to recover the identical money as it seeks to recover in the state court action. While it seeks a greater sum of damages here than there, I cannot see how a different measure of damages for the same acts can create a right to two inconsistent remedies for those acts where, as here, the plaintiff by suit *ex contractu* in the state court waived the tort. The essence of the cause of action in both suits is the violation of the primary right which the plaintiff had to honest dealings by both Blade and his co-defendants here. It constituted a single cause of action.

As stated by the Supreme Court of California in *Wulfjen v. Dolton,* 24 Cal. 2d 891, at 895, 896 (1944), "The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."

By electing to sue *ex contractu* in the state court the plaintiff waived the tort by Blade, and one cannot waive

half a tort by suing in contract and then sue in another case for the other half of the tort. When one sues *ex contractu,* whether on an express or implied contract, the bringing of that suit affirms the contract. It is the essence of the plaintiff's cause of action in the within case that it disaffirms and disavows the acts of Blade in letting contracts and receiving money from his co-defendants; it is the essence of the plaintiff's cause of action in the state court that the defendant Blade was under the obligation of an implied contract to pay over to the plaintiff all moneys that he received.

In *Robb v. Vos,* 155 U. S. 1 (1894), at page 41, the court stated as follows:

> *"Thompson v. Howard,* 31 Michigan, 309, 312, was a case where a father who had brought an action of assumpsit for a minor son's wages, and, after the jury disagreed, had discontinued the suit, and brought an action for the unlawful enticing away and harboring the son. The Supreme Court said: 'A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. . . . (The plaintiff's) proceeding necessarily implied that the defendant had the young man's services during the time *with plaintiff's assent,* and this was absolutely repugnant to the foundation of this suit, which is, that the young man was drawn away and into defendant's service *against the plaintiff's assent.*'

"In *Conrow v. Little,* 115 N. Y. 387, 393, 394, the court said: 'The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practised by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of "a breach of contract to pay for goods and money loaned obtained by fraud." The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one, the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practised by Branscom, the plaintiffs waived the right to disaffirm the contract, and the

defendants may justly hold them to their election. The principle applied in *Foundry Company v. Hersee,* 103 N. Y. 26, and *Hays v. Midas,* 104 N. Y. 602, require this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practised by the vendee; and by reason of it the plaintiffs were put to their election.

"'It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, and is of no consequence whether or not the plaintiffs made their choice effective.'"

The plaintiff cannot ratify half of the acts of Blade in dealing with his co-defendants by suit and attachment, where those acts are indivisible, as here, then sue in this court *ex delicto* not only for that half but as well for the additional half. So far as Blade is concerned he had one single indivisible obligation to his employer. He violated that obligation according to the complaint here and in the state court. The plaintiff was confronted with making a decisive choice—it could sue Blade *ex contractu* and attach his property, thus securing itself by that attachment for any judgment it might ultimately get, and assuring itself thereby that it would get something back from Blade for his wrong to it before Blade could sequester the property—or it could forego that right and sue him *ex delicto* and take its chances on ever collecting a judgment.

It was a choice with which every lawyer is confronted; whether to take the bird in hand by attachment, or try to get two birds in the bush by a fraud action. It chose to take the bird in hand. It was a knowing choice with its advantage of attachment. The law says it was a decisive choice. And the law will not permit it to pursue both choices at the same time merely because by a fraud action it may be more nearly able to recoup a greater sum than in the *ex contractu* action.

By the allegations in the complaint in this action and the complaint and bill of particulars in the state action, Blade and his co-defendants here joined in a single wrong, namely, fraud upon the plaintiff, which the plaintiff elected to waive by bringing the state action. It cannot now split its causes of action into several suits. *Robb v. Vos, supra; Paladini v. Municipal Markets Co.* (1921), 185 Cal. 672; *Nightingale v. Scannell* (1855), 6 Cal. 506, at 509; *Herriter v. Porter* (1863), 28 Cal. 385 at 387; *Van Horne v. Treadwell* (1913), 164 Cal. 620 at 622; *Grain v. Aldrich* (1869), 38 Cal. 514 at 519.

The defendant Blade is entitled to summary judgment on his motion and that will be the order of the court.